

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANGELA EVANS, an individual;

Case No. 2:20-cv-000986-ART-VCF

Plaintiff,

ORDER

v.

VALLEY ELECTRIC ASSOCIATION,
INC.; DOES I through X and ROE
CORPORATIONS XI through XX,
inclusive;

Defendants.

I. SUMMARY

Plaintiff Angela Evans (“Evans”) brings this action alleging that Defendant Valley Electric Association (“VEA”) unlawfully terminated her and discriminated against her on the basis of race, sex, national origin, and age, among other claims. Before the Court is Defendant VEA’s Motion for Summary Judgment (ECF No. 80) and Evans’ Motion for an Order Directing Additional Discovery (ECF No. 87). For the reasons set forth in this order, the Court grants in part and denies in part VEA’s Motion for Summary Judgment and denies Evans’ Motion for an Order Directing Additional Discovery.

II. BACKGROUND

Except as noted, the following facts are undisputed. Angela Evans is a fifty-nine-year-old, Hispanic woman with thirty years of experience working with public utilities. (Compl. ¶¶27, 28; ECF No. 1-1). VEA is a member-owned electric utility cooperative established in 1965 and headquartered in Pahrump, Nevada. (Mot. Summ. J. at 1:18-19, ECF No. 80 (“MSJ”)); Compl. ¶18). VEA is governed by an elected board of directors and serves 45,000 ratepayers across Southwest Nevada. (Hall Aff. ¶3, ECF No. 80-1; Compl. ¶19).

A. Evans Was Hired at VEA and Promoted to CEO

Evans was initially hired at VEA as an Executive Vice President and was promoted to permanent Chief Executive Officer (“CEO”) approximately twenty months later. (MSJ at 2:7-3:12). On January 10, 2017, VEA offered Evans a position as “Executive Vice President of Operations” after Evans responded to an online job posting created by VEA. (Compl. ¶¶29, 30; Evans Offer Letter, 1, ECF No. 80-6). In February 2017 Evans accepted VEA’s offer and began work at VEA later that month. (Compl. ¶ 30). Evans’ starting salary was \$180,000 per year, which was \$50,000 less than other Executive Vice Presidents at VEA—two white women and a non-white man—who were paid a higher salary of \$230,000 per year. (Evans Dep. Tr. at 37:23-25, ECF No. 80-4; MSJ at 13:16-19). On or about April 14, 2018, VEA’s previous CEO, Tom Husted (“Husted”), selected Evans and another employee—Ken Johnson (“Johnson”)—to temporarily rotate through two COO positions and increased Evans’ salary to \$230,000 per year. (Evans Dep. at 78:1-22, ECF No. 80-4).

Shortly after Evans was rotated into the COO position, VEA fired Husted after a female employee accused him of sexual misconduct. Evans, who was the only candidate considered for the interim CEO position, was promoted to interim CEO on May 4, 2018. After VEA’s preferred candidate for permanent CEO, Byron Nolde, withdrew from consideration, Evans was promoted to permanent CEO on or about October 1, 2018. (Compl. ¶¶32-33; MSJ at 2:19-24, 3:5-13). As CEO, Evans oversaw a significant rate increase and workforce reductions intended to improve VEA’s financial health. (MSJ at 3:15-19). Workforce reductions included a voluntary separation program in December 2018 and involuntary layoffs in late January or early February 2019. (Evans Dep. at 105:22-24, 112:7-23, ECF No. 80-4). The 2019 rate increase was the first imposed on VEA’s members in more than ten years and “enraged” VEA’s members. (MSJ at 3:20-23).

Also in January or early February 2019, Evans supervised the termination of

1 Johnson, who was accused of sexual harassment by thirteen female VEA
2 employees. (Evans Dep. Tr. p. 128:13-23, ECF No. 80-7).

3 **B. Evans Was Arrested and Put on Administrative Leave**

4 After he was fired, Johnson became an active critic of VEA and Evans, and
5 spearheaded a campaign to have Evans arrested and removed as CEO. Johnson
6 founded “VEA Members for Change” (“MFC”), a group committed to recalling
7 VEA’s Board of Directors, including CEO Evans, around February 15, 2019. (MSJ
8 at 3:24-4:5; Facebook Poll at 2, ECF No. 80-30 (showing a MFC page creation
9 date of February 15, 2019); Johnson Dep. Tr. 18:4-25, ECF No. 80-13). Johnson
10 tipped off another member of MFC, Nye County Sheriff’s Office (“NCSO”)
11 Lieutenant Boruchowitz, about alleged criminal acts by Evans. Boruchowitz
12 helped Johnson establish MFC and later became a spokesperson for the group.
13 (MSJ at 4:14-23).

14 Based on Johnson’s tips and with Boruchowitz’s help, the NCSO investigated
15 and ultimately arrested Evans in February 2019. Prior to Evans’ arrest, the NSCO
16 twice obtained and executed search warrants orchestrated by Boruchowitz. (MSJ
17 at 4 fn.3). The first search warrant, executed on February 22, 2019, was based
18 on allegations that VEA paid “hush money” to keep secret the allegations against
19 former CEO Husted. (MSJ at 4:24-5:4). On February 25, 2019, Johnson again
20 contacted the NCSO, this time claiming that Evans had work performed on VEA
21 infrastructure behind a home she was planning to purchase at no cost to Evans.
22 (MSJ at 5:5-7; Perra Email at 1, ECF No. 80-18). The next day, on February 26,
23 2019, NSCO obtained and executed a second search warrant at VEA and arrested
24 Evans on suspicion of embezzling from VEA. (MSJ at 5:9-11).

25 After Evans’ arrest, VEA placed Evans on paid administrative leave on
26 February 26, 2019 and ordered an investigation into Evans’ arrest and related
27 matters. (Compl. ¶ 39; MSJ at 6:20-7:2). VEA hired Dick Peck, a white male, to
28 serve as its interim CEO while Evans was on administrative leave. (MSJ at 6:9-

1 10).

2 From March until late May, Evans did not know if she would be allowed to
3 return to VEA, even after it cleared her of criminal wrongdoing. A VEA Board
4 Member, Ken Derschan, allegedly told Evans in late March that she could return
5 to work on or about April 27, 2019, under the supervision of Peck, the interim
6 CEO. (Compl. ¶¶ 41, 43; Evans Decl. ¶2, ECF No. 86-1; Evans Dep. Tr. at 94:21-
7 24, ECF No. 86-5).

8 VEA's internal investigation of Evans cleared her of criminal wrongdoing but
9 reprimanded her for violating an internal VEA policy Peck characterized publicly
10 as an "integrity policy." (Pub. Summ. of Josh M. Reid Rep. at 2; Jeffrey Meehan,
11 *Two months after arrest, no charges filed on VEA's Evans*, PAHRUMP VALLEY TIMES,
12 May 1, 2019, at 3, ECF No. 51-3). The summary of the report generated by VEA's
13 internal investigation is dated April 22, 2019. (Pub. Summ. of Josh M. Reid Rep.
14 at 1). The summary found "Ms. Evans' [sic] did not commit any illegal acts with
15 respect to the Property," and that "the allegations made by the Nye County
16 Sheriff's Office relating to Ms. Evans' actions are unfounded." (*Id.* at 2). The
17 summary also found that that Evans violated VEA's "integrity policy" because she
18 "should have disclosed her interest in The Property to her supervisor, former VEA
19 CEO Thomas Husted . . . pursuant to VEA Employment Policy #107." (Pub.
20 Summ. of Josh M. Reid Rep. at 2). Evans claims that she did inform VEA
21 leadership she was planning to purchase the Property. (Evans Dep. Tr. at 95:2-
22 95:20, ECF No. 86-5). Evans and VEA agree that the embezzlement allegations
23 against Evans are false. (Evans Dep. at 125:1-16, ECF No. 80-4; MSJ at 5:1-2).

24 While VEA publicized those findings, it waited one month to transmit the report
25 to the District Attorney. Interim CEO Peck announced the investigation's findings
26 to the press, communicating that Evans violated no laws. (Press Footage of
27 Richard Peck, ECF No. 80-27). Referring to "The private investigation of the
28 Angela Evans Affair—as I call it," Peck stated that "the investigation found no

1 illegal activities.” (*Id.*). Peck also signaled that VEA’s Board would decide at its
 2 upcoming meeting in May whether Evans would return to VEA and its decision
 3 was tethered to the disposition of the criminal case. Peck stated, “After the annual
 4 meeting the first week in May [the Board will determin[e] whether to bring back
 5 Angela at that time. They postponed it until after her arraignment.” (*Id.*). Peck
 6 acknowledged that as of May 17, 2019 the report was not sent to the District
 7 Attorney. (Jeffrey Meehan, *Valley leader speaks on ongoing investigations*,
 8 PAHRUMP VALLEY TIMES May 17, 2019, at 3, ECF No. 51-1 (“I don’t know why they
 9 didn’t send [the report] even though they said they were going to,’ Peck said.”)).
 10 VEA waited until May 21, 2019 to transmit the report to the District Attorney and
 11 requested it not be made public. (Arabia Email at 1, ECF 80-28). The District
 12 Attorney formally dismissed the charges against Evans on November 5, 2019.
 13 (Denial from Chris Arabia, District Attorney at 1, ECF No. 51-12).

14 **C. Evans was fired after refusing to resign and complaining of**
 15 **discrimination.**

16 In May and June 2019, VEA’s Board urged Evans to resign. VEA Board
 17 member Dave Hall met with Evans and requested her resignation on May 29,
 18 2019. (MSJ 8:15-16; Hall Aff. ¶17). Evans refused. (Evans Dep. at 155:18-156:5,
 19 ECF No. 80-4). On or about June 5, 2019, Interim CEO Peck met with Evans to
 20 persuade her to “take the separation package,” (MSJ 8:22-24; Evans Dep. at
 21 162:19-163:9, 164:20-23, ECF No. 80-4), and met with a search firm to discuss
 22 beginning a search for a new CEO to replace Evans (MSJ at 9:3; Search Firm
 23 Email at 1, ECF No. 80-35).

24 Evans was fired eleven days after she complained of discrimination. Her
 25 internal complaint with VEA, filed on June 17, 2019, alleged that she was being
 26 treated “unfairly, inappropriately, and discriminated against as a female, 56-
 27 year-old Hispanic CEO.” (Evans Internal Compl. at 2, ECF 80-36). After learning
 28 of Evans’ refusal to resign (based on her June 17, 2019, letter), the Board met on

1 June 27, 2019, voted to terminate Evans effective June 30, 2019, and informed
2 Evans of its decision by letter dated June 28, 2019. (Termination Letter at 2, ECF
3 No. 80-37). VEA noted that it would investigate Evans' internal discrimination
4 claim. (*Id.*)

5 In Evans' termination letter, VEA explained its reasons for firing Evans. The
6 letter stated that after Evans was arrested for embezzlement, "it has become
7 apparent that VEA's members have lost confidence in you" and "numerous
8 meetings between VEA and its members have involved members voicing strong
9 distrust in you." (*Id.* at 1). VEA explained that "outside investigators" concluded
10 that allegations that Evans violated VEA policies were "founded" and allegations
11 that Evans "engaged in criminal conduct were unfounded." (*Id.* at 1 fn.1). VEA
12 confirmed that a board member urged Evans to resign and gave her several weeks
13 to mull it over, adding, "By resigning your employment, you would not have forced
14 VEA to take action with respect to your employment." (*Id.* at 2). "Since you elected
15 not to resign," the letter added, the VEA Board "met and voted to terminate your
16 employment effective June 30, 2019." (*Id.*)

17 Evans received less severance than her predecessor Husted. (Thurgood Dep.
18 Tr. at 133:21-25, ECF No. 86-4).

19 After Evans was fired, VEA hired an attorney to investigate Evans' claim of
20 discrimination. (MSJ 9:16-17; Ginapp Aff. ¶2, ECF No. 80-38). The investigator
21 attempted to reach Evans for an interview through her counsel, but Evans
22 declined (Evans Dep. at 171:9-14, ECF No. 80-4) and the investigator did not
23 prepare a written report because she did not "have Ms. Evans' version of the
24 facts." (Ginapp Aff. at 3:1-9). The investigator stated that she preliminarily
25 concluded "there was insufficient evidence to substantiate Ms. Evans' allegations
26 of sex, race, national origin, or age discrimination and retaliation." (Ginapp Aff.
27 at 2:22-24).

28 Evans filed a Charge of Discrimination with the EEOC on December 4, 2019.

1 (EEOC Charge at 1, ECF No. 1-1). Evans checked boxes on the Charge form for
2 retaliation and discrimination based on race, sex, national origin, and age, and
3 claimed the discrimination began on February 26, 2019 and ended on June 30,
4 2019. (EEOC Charge at 1). Evans alleged that she was “subject to unequal terms
5 and conditions of employment by Valley Electric Association” because she was
6 “wrongly placed on administrative leave pending a third-party investigation of
7 allegations against [her],” told she “would be brought back as CEO following the
8 conclusion of VEA’s annual membership meeting on April 27, 2019,” told she
9 “would be ‘mentored’ by an Interim Chief Executive upon [her] return,” and
10 terminated after she filed an internal complaint about discrimination and
11 requested an investigation. (EEOC Charge at 1-2). The EEOC issued Evans a
12 Notice of Right to Sue on or about December 5, 2019. (Compl. ¶17).

13 VEA has had four CEOs since Evans’ arrest including acting, interim, and
14 non-interim CEOs. (MSJ 9:21-22; Bart Thurgood Aff. ¶29, ECF No. 80-3). Three
15 of these CEOs are white men: Steve Morrison, David Peck, and Mark Stallons—
16 VEA’s current, permanent CEO. (MSJ 10:4; Thurgood Aff. ¶29). One, Terri
17 D’Antonio, is a white woman. (Thurgood Aff. ¶29).

18 Evans’s Complaint alleges eight causes of action (“claims”): Claim 1 alleges sex
19 discrimination, harassment, and retaliation in violation of Title VII, 42 U.S.C.
20 § 2000e, et seq.; Claim 2 and 3 allege national origin and race discrimination,
21 harassment, and retaliation in violation of Title VII, 42 U.S.C. § 2000e, et seq.;
22 Claim 4 alleges race/ethnicity discrimination, harassment, and retaliation in
23 violation of 42 U.S.C. § 1981; Claim 5 alleges age discrimination, harassment,
24 and retaliation in violation of 29 U.S.C. § 623, et seq.; Claim 6 alleges retaliation
25 in violation of Title VII, 42 U.S.C. § 2000e, et seq., 29 U.S.C. § 623, et seq., and
26 42 U.S.C. § 1981, et al; Claim 7 alleges luring under false pretenses in violation
27 of Nevada Revised Statute § 613.010; and Claim 8 alleges negligent hiring,
28 training, and supervision in violation of Nevada law. After Evans’ initially filed her

1 Complaint in state court in Clark County, Nevada, VEA removed the case to this
2 Court. VEA moves for summary judgment on all eight claims.

3 **III. LEGAL STANDARD**

4 “The purpose of summary judgment is to avoid unnecessary trials when there
5 is no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t*
6 *of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). Summary
7 judgment is appropriate when the pleadings, the discovery and disclosure
8 materials on file, and any affidavits “show there is no genuine issue as to any
9 material fact and that the movant is entitled to judgment as a matter of law.”
10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is “genuine” if there
11 is a sufficient evidentiary basis on which a reasonable fact-finder could find for
12 the nonmoving party and a dispute is “material” if it could affect the outcome of
13 the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
14 248-49 (1986). Where reasonable minds could differ on the material facts at
15 issue, however, summary judgment is not appropriate. *See id.* at 250-51. “The
16 amount of evidence necessary to raise a genuine issue of material fact is enough
17 ‘to require a jury or judge to resolve the parties’ differing versions of the truth at
18 trial.” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First*
19 *Nat’l Bank v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). The court must
20 view the facts in the light most favorable to the non-moving party and give it the
21 benefit of all reasonable inferences to be drawn from those facts. *Matsushita Elec.*
22 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court must not
23 weigh the evidence or determine the truth of the matter, but only determine
24 whether there is a genuine issue for trial. *Balint v. Carson City*, 180 F.3d 1047,
25 1054 (9th Cir. 1999).

26 The party seeking summary judgment bears the initial burden of informing
27 the court of the basis for its motion and identifying those portions of the record
28 that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477

1 U.S. at 323. Once the moving party satisfies Rule 56’s requirements, the burden
2 shifts to the non-moving party to “set forth specific facts showing that there is a
3 genuine issue for trial.” *Anderson*, 477 U.S. at 256. The nonmoving party “may
4 not rely on denials in the pleadings but must produce specific evidence, through
5 affidavits or admissible discovery material, to show that the dispute exists,” *Bhan*
6 *v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more
7 than simply show that there is some metaphysical doubt as to the material facts.”
8 *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec.*
9 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). “[V]ery little evidence
10 [is required] to survive summary judgment in a discrimination case because the
11 ultimate question is one that can only be resolved through a ‘searching inquiry’—
12 one that is most appropriately conducted by the fact finder upon a full record.”
13 *Reynaga v. Roseberg Forest Prod.*, 847 F.3d 678, 691 (9th Cir. 2017) (quoting
14 *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996)).

15 **IV. DISCUSSION**

16 VEA moved for summary judgment on all eight of Evans’ claims, arguing that
17 Evans failed to exhaust portions of Claims 1-3, and 5 (MSJ at 11-13, 16). The
18 Court finds that Evans exhausted her pay and mentorship-related claims, but
19 did not exhaust her harassment-related claims, so VEA is entitled to summary
20 judgment on the harassment theory asserted in Claims 1, 2, 3, and 5 (based on
21 sex, national origin, race, and age). VEA is additionally entitled to summary
22 judgment on Evans’ age-discrimination claim (Claim 5), luring claim (Claim 7),
23 and negligent hiring claim (Claim 8). VEA is not entitled to summary judgment
24 on Evans’ discrimination and retaliation theories in Claims 1, 2, 3, 4, and 6
25 (based on sex, national origin, and race).

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A. Administrative Exhaustion

1. Legal Framework

Title VII requires a plaintiff to exhaust their civil remedies before filing a civil action against an employer. To satisfy this requirement the plaintiff must, among other things: (1) file a complaint with the EEOC within 180 days after the alleged unlawful employment practice, 42 U.S.C. §2000e-5(e)(1) (noting the period is 300 days if the plaintiff “initially instituted proceedings” with a state agency); *see Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1174 (9th Cir. 1999), and (2) timely institute their action “within ninety days from the issuance of the right to sue letter by the EEOC,” *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1172 (9th Cir. 1986). Generally, employers are liable only for actions occurring “within the 180- or 300—day time period after the discrete discriminatory act occurred” and “discrete discriminatory acts are not actionable if time barred. . . .” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (noting exception for harassment cases). But, employees may use time-barred discriminatory acts “as background evidence in support of a timely claim.” *Id.* Title VII’s exhaustion requirement is a “mandatory” claims processing rule, and a court “must enforce” such rules if a party “properly raise[s] it.” *See Fort Bend Cnty., Texas v. Davis*, 139 S. Ct. 1843, 1849, 1851 (2019) (citations omitted).

Title VII’s exhaustion requirement “afford[s] the agency an opportunity to investigate the charge” and “narrow[s] the issues for prompt adjudication and decision.” *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1099 (9th Cir. 2002) (citation omitted). EEOC complaints are construed “with utmost liberality,” so even an “exceedingly sparse” EEOC charge can exhaust a claim. *Id.* at 1100. “It is sufficient that the EEOC be apprised, in general terms, of the alleged discriminating parties and the alleged discriminatory acts.” *Chung v. Pomona Valley Cmty. Hosp.*, 667 F.2d 788, 790 (9th Cir. 1982) (citations omitted).

Federal courts may only consider claims “like or reasonably related to the

allegations contained in the EEOC charge.” *B.K.B.*, 276 F.3d at 1100 (citations omitted). This court may adjudicate claims either “within the scope of the EEOC’s *actual* investigation or an EEOC investigation which can *reasonably be expected* to grow out of the charge of discrimination.” *Lyons v. England*, 307 F.3d 1092, 1104 (9th Cir. 2002) (quoting *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994) (emphasis in original)). Because the EEOC charge is the seed from which the EEOC investigation grows, “[t]he crucial element of a charge of discrimination is the factual statement contained therein.” *B.K.B.*, 276 F.3d at 1100 (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970)).

2. Evans administratively exhausted claims relating to pay inequity, severance, and mentorship.

VEA argues that Evans failed to administratively exhaust her claim that she suffered pay disparities when she joined VEA. (MSJ at 11:24-13:6). In her EEOC Charge, Evans complains of “unequal terms and conditions of employment.” (EEOC Charge at 1). The EEOC considers compensation to be among the “terms and conditions” of employment. *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL § 15-VII EQUAL OPPORTUNITY FOR JOB SUCCESS, (“Employers cannot permit race bias to affect . . . pay . . . or any other term, condition, or privilege of employment.”); EEOC COMPLIANCE MANUAL § 2-II.B.1 THRESHOLD ISSUES (listing “compensation” among issues relating to “terms, conditions, or privileges of employment”). An EEOC investigation into “terms and conditions” of employment would necessarily include an investigation into compensation because compensation is perhaps the most important “term” or “condition” of an employment relationship. Because unequal terms and conditions of employment encompasses pay disparity, Evans exhausted her pay inequity claims.

Evans exhausted her administrative remedies relating to severance and

1 mentorship. Specifically, Intake Notes from Evans' meeting with the EEOC
2 investigator mention Evans' alleged refusal to accept the severance package
3 offered by VEA (EEOC Intake Notes at 3, ECF No. 80-40). An investigation into
4 Evans' claim of being "terminated unlawfully" (EEOC Charge at 2, ECF No. 1-1)
5 necessarily would have involved an inquiry into the conditions of Evans'
6 termination, including VEA's severance offer. (Thurgood Dep. at 133:21-25).
7 Evans explicitly stated in her EEOC Charge that she was told she would be
8 "mentored" by an Interim Chief Executive upon [her] return," (EEOC Charge at
9 1), indicating that VEA allegedly conditioned Evans' return on agreeing to be
10 mentored. An EEOC investigation into the details of Evans' allegations on
11 severance or mentorship could "reasonably be expected to grow out of the charge
12 of discrimination." *Lyons v. England*, 307 F.3d at 1104.

13 For these reasons, this Court finds that Evans did administratively exhaust
14 her claims relating to pay inequity, severance, and mentorship.

15 **3. Evans failed to exhaust her harassment claims.**

16 Evans alleges workplace harassment based on sex, national origin, race, and
17 age (Claims 1, 2, 3 and 5), but failed to administratively exhaust any claim of
18 harassment or "hostile work environment" (MSJ 16:4-21). Although an EEOC
19 Charge is construed with "utmost liberality" and can be "exceedingly sparse," a
20 plaintiff must include some factual kernel of the claim in her EEOC Charge such
21 than an investigation of harassment "reasonably be expected to grow out of" the
22 charge or complaint. *B.K.B.*, 276 F.3d at 1100-1101. Neither Evans' EEOC
23 Charge (ECF No. 1-1), nor her internal complaint to VEA, (ECF No. 80-36), nor
24 her EEOC Intake Notes (ECF No. 80-40) contain any reference to "harassment."
25 The absence of any reference to harassment precludes a finding that Evans
26 administratively exhausted this claim with respect to any claim for relief, namely
27 discrimination based on sex, race, national origin, ethnicity, or age.

28 Because VEA rightly argues that Evans failed to administratively exhaust her

1 harassment claims, VEA is entitled to summary judgment on the harassment
 2 theory in Claims 1, 2, 3, and 5. *See Fort Bend Cnty., Texas v. Davis*, 139 S. Ct.
 3 1843, 1849, 1851 (mandating enforcement of Title VII’s administrative
 4 exhaustion requirement).

5 **4. Evans exhausted her ADEA claims.**

6 Evans administratively exhausted her ADEA claims by checking the box for
 7 “age” under “discrimination based on” and explicitly claiming she was
 8 “discriminated against and retaliated against because of my age. . . .” (EEOC
 9 Charge at 1-2). Doing so apprised the EEOC (and VEA) that age was one basis
 10 upon which Evans asserted discrimination. *See Chung*, 667 F.2d at 790.

11 **B. Evans Presents Genuine Issues of Material Fact Regarding Her Claims** 12 **of Disparate Treatment Discrimination Under Title VII (Claims 1, 2,** 13 **and 3)**

14 **1. Legal Standard**

15 “To show a prima facie case of disparate treatment, a plaintiff must offer
 16 evidence that ‘give[s] rise to an inference of unlawful discrimination.’” *Reynaga v.*
 17 *Roseburg Forest Products*, 847 F.3d 678, 690 (9th Cir. 2017) (quoting *Sischo-*
 18 *Nownejad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1110 (9th Cir. 1991)
 19 *superseded on other grounds as recognized by Dominguez-Curry v. Nev. Transp.*
 20 *Dep’t*, 424 F.3d 1027, 1041 (9th Cir. 2005)).

21 A plaintiff may establish an inference of discrimination either by satisfying the
 22 prima facie elements from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802
 23 (1973) or, in the alternative, by producing “direct or circumstantial evidence
 24 demonstrating that a discriminatory reason ‘more likely than not motivated’ the
 25 employer.” *Reynaga*, 847 F.3d at 691 (citing *Metoyer v. Chassman*, 504 F.3d 919,
 26 931 (9th Cir. 2007)); *see also McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th
 27 Cir. 2004).

28 Evans relies on the three-step burden-shifting framework outlined in

1 *McDonnell Douglas*. This Court analyzes each step in turn.

2 **2. Evans makes a prima facie case of race, national origin, and sex**
 3 **discrimination under Title VII.**

4 Under *McDonnell Douglas*, “a plaintiff alleging disparate treatment under Title
 5 VII must first establish a prima facie case of discrimination. Specifically, the
 6 plaintiff must show that (1) [s]he belongs to a protected class; (2) [s]he was
 7 qualified for the position; (3) [s]he was subject to an adverse employment action;
 8 and (4) similarly situated individuals outside his protected class were treated
 9 more favorably.” *Chuang v. Univ. of Cal. Davis Bd. of Trustees*, 225 F.3d 1115,
 10 1123 (9th Cir. 2000) (citation omitted).

11 Here only the fourth prong is at issue. In its Motion for Summary Judgment,
 12 VEA does not contest that Evans, a Hispanic woman, is a member of a protected
 13 class, dispute her qualifications for CEO, or contest that she suffered an adverse
 14 employment action when she was fired from VEA. At issue under the fourth prong
 15 is whether Evans can show that other CEOs at VEA were “similarly situated”
 16 individuals outside Evans’ protected classes who were “treated more favorably.”
 17 *Chuang*, 225 F.3d at 1123. “Other employees are similarly situated to the plaintiff
 18 when they have similar jobs and display similar conduct.” *Earl v. Nielsen Media*
 19 *Rsch., Inc.*, 658 F.3d 1108, 1114 (9th Cir. 2011) (internal quotation marks
 20 omitted).

21 A reasonable jury could find that Evans is similarly situated to others who
 22 have served as CEO at VEA, including former-CEO Husted, and subsequent
 23 interim and permanent CEOs Peck, D’Antonio, and Stallons. “[W]hether two
 24 employees are similarly situated is ordinarily a question of fact” *See Beck v.*
 25 *United Food & Commercial Workers Union Local 99*, 506 F.3d 874, 885 n.5 (9th
 26 Cir. 2007). “[E]mployees are similarly situated to the plaintiff when they ‘have
 27 similar jobs and display similar conduct.’” *Earl*, 658 F.3d at 1114 (quoting
 28 *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003)). To be

1 similarly situated, “the employees need not be identical, but must be similar in
2 material respects.” *Id.* (quoting *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151,
3 1157 (9th Cir. 2010)). “Materiality depends on the context and is a question of
4 fact that ‘cannot be mechanically resolved.’” *Id.* (quoting *Hawn*, 615 F.3d at 1157-
5 58).

6 VEA submits no evidence that other CEOs at VEA, including Husted, Peck,
7 D’Antonio, and Stallons,¹ possessed different job duties, were subject to different
8 VEA policies and procedures, or were responsible to VEA’s Board in different ways
9 despite all holding the title of “Chief Executive Officer.” VEA’s suggestion that the
10 other CEOs cannot be similarly situated because they never faced criminal
11 prosecution (MSJ at 15 fn.18) is not dispositive because the precise contours of
12 “similarly situated” is a factual issue. VEA argues that it gave Husted the “same
13 choice,” namely to “resign or be terminated,” when he was accused of sexually
14 harassing female employees at VEA (MSJ at 8:6-7). VEA’s own rhetoric lumping
15 together its treatment of Evans and Husted belies its argument that they are not
16 similarly situated. A reasonable jury could find that Evans was “similarly
17 situated” to Husted, Peck, D’Antonio, and/or Stallons.

18 As support for Evans’ claims that she was treated less favorably than similarly
19 situated CEOs at VEA, Evans cites differentials in severance pay, working
20 conditions, and VEA’s history of hiring white males for CEO. Evans presented
21 evidence that she was given less severance than her predecessor CEO (Thurgood
22 Dep. Tr. at 133:21-25, ECF No. 86-4). Such differences in severance payments
23 offered to similarly situated employees may establish a prima facie case of
24 discrimination under *McDonnell Douglas*. See *McGuinness v. Lincoln Hall*, 263
25 F.3d 49, 53, 54-55 (2d Cir. 2001) (plaintiff established she was similarly situated
26

27 ¹ Evans was not similarly situated to CEO Morrison, who served for only one week
28 and “had no responsibilities other than to maintain the status quo until Peck
could arrive.” (MSJ at 10 fn.14; Thurgood Aff. ¶28).

1 to a colleague who received more money in severance); *see also Gerner v. Cnty.*
 2 *Of Chesterfield, Va.*, 674 F.3d 264, 268-69 (4th Cir. 2012) (reversing dismissal of
 3 plaintiff's complaint alleging differential severance payments)). Evans also
 4 presented evidence that VEA initially told Evans that her return as CEO was
 5 conditioned on her having a white male mentor, a step that was without known
 6 precedent in VEA's history, (Evans Decl. ¶ 2, ECF No. 86-1), and that three of the
 7 four CEOs who succeeded Evans in some capacity, including her permanent
 8 replacement, were white males, (MSJ at pp. 9:21-22, 10:4, 15; Thurgood Aff. ¶29).
 9 While Evans need not show that she was replaced by an individual outside her
 10 protected class(es), *see Lyons*, 307 F.3d 1092 at 1117, such evidence "may help
 11 to raise an inference of discrimination," *see Carson v. Bethlehem Steel Corp.*, 82
 12 F.3d 157, 159 (7th Cir. 1996).

13 Construing all evidence in Evans' favor, this Court finds that Evans has met
 14 her prima facie burden by presenting admissible, cumulative evidence that would
 15 allow a reasonable jury to conclude that similarly situated CEOs at VEA outside
 16 Evans' protected classes were treated more favorably than her.

17 **3. VEA articulated a legitimate, nondiscriminatory reason for its actions.**

18 Because Evans produced evidence sufficient to establish a prima facie case
 19 under *McDonnell Douglas*, "[t]he burden of production, but not persuasion, ...
 20 shifts to [VEA] to articulate some legitimate, nondiscriminatory reason for the
 21 challenged action." *Chuang*, 225 F.3d at 1123-24; *see also McDonnell Douglas*,
 22 411 U.S. at 802. "[A] defendant meets its resulting burden of production by
 23 'introduc[ing] evidence, which, taken as true, would permit the conclusion that
 24 there was a nondiscriminatory reason for the adverse action." *Bodett v. CoxCom,*
 25 *Inc.*, 366 F.3d 736, 742 (9th Cir. 2004) (quoting *St. Mary's Ctr. v. Hicks*, 509 U.S.
 26 502, 509 (1993)). Here, VEA alleges that Evans was fired because "the fact that
 27 Plaintiff was arrested and, for months, faced the threat of criminal prosecution .
 28 . . led VEA to conclude that her return to VEA would be devastating to member

relations.” (MSJ at 15:23-25). VEA’s allegation is supported by substantial evidence, including the testimony of VEA employees. (Thurgood Aff. ¶23; Hall Aff. ¶¶11-13). VEA has therefore met its burden of production at step two.

4. Evans has demonstrated sufficient evidence of pretext for her Title VII discrimination claims to proceed.

Given that VEA does articulate a legitimate, nondiscriminatory reason for the challenged action, the burden shifts back to Evans to identify evidence that the proffered reasons were a pretext for discrimination. *See McDonnell Douglas*, 411 U.S. at 804. “[A]t the summary judgment stage, a plaintiff may raise a genuine issue of material fact as to pretext via (1) direct evidence of the employer’s discriminatory motive or (2) indirect evidence that undermines the credibility of the employer’s articulated reasons.” *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1170-71 (9th Cir. 2007) (quotation omitted). “All of the evidence [as to pretext]—whether direct or indirect—is to be considered cumulatively.” *Id.* at 1170 (quoting *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003) (alterations in original)). To defeat summary judgment Evans “must only demonstrate that there is a genuine dispute of material fact regarding pretext. The amount of evidence required to do so is minimal.” *Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1127 (9th Cir. 2009) (citing *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004). “[V]ery little evidence is necessary to raise a genuine issue of fact regarding an employer’s motive,” so “[w]hen the evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason.” *McGinest*, 360 F.3d at 1124. To show pretext, Evans points to evidence that VEA’s stated reason for terminating her is not credible and VEA failed to fully support Evans after her arrest. Evans also disputes the claim that VEA members would have opposed her return as CEO.

Although VEA claims it fired Evans based “only” on her arrest and its

1 members' response, the record is replete with evidence tending to show that
2 VEA's explanation is unworthy of credence. "Proof that the defendant's
3 explanation is unworthy of credence is [a] form of circumstantial evidence that is
4 probative of intentional discrimination, and it may be quite persuasive."
5 *McGinest*, 360 F.3d at 1123 (quoting *Reeves v. Sanderson Plumbing Prod., Inc.*,
6 530 U.S. 133, 147 (2000)). VEA asserts that it "only terminated Plaintiff's
7 employment because of her arrest (and the unrelenting anger that this arrest
8 caused VEA's members-owners)." (MSJ at 22:4-5). But at least three witnesses,
9 including former VEA employees, testified that the rate hike Evans implemented
10 before her arrest, not the arrest itself, was the root cause of member outrage
11 against her and VEA and led to her being fired. Former employee Ken Johnson
12 testified, "[I]t was the rate increase, not her arrest that was really behind the
13 angst. . . ." and led to Evans being fired. (Johnson Dep. at 97:6-8). Evans' former
14 real estate agent and VEA member Renee West testified that the rate hike "made
15 a lot of people very mad" because members earlier had been promised there would
16 be no rate hike for years to come. (West Dep. at 99:3-8). Interim CEO Peck stated
17 that the rate increase—prior to Evans' arrest—was seen by VEA members as a
18 "breach of the promise that VEA had made to them" and indicated that "members'
19 frustration was focused on Ms. Evans." (Peck Aff. ¶3, ECF No. 80-24). VEA
20 specifically represents that it terminated Evans only because of her arrest and
21 the anger it caused. A reasonable jury could find that the rate hike, not Evans
22 arrest, led to Evans' firing. The evidence regarding members' ire about the rate
23 hike raises a genuine issue of material fact regarding the credibility of the VEA's
24 proffered reasons for terminating Evans.

25 Evans also disputes VEA's claim that it "supported her even after she was
26 arrested on suspicion of embezzlement. . . ." (MSJ at 15:9-10). VEA delayed
27 sending to the Nye County District Attorney its investigation concluding that
28 Evans did not commit embezzlement. The summary of the investigation was

1 dated April 22, 2019, and Evans asked VEA on May 1, 2019, to send “the report
2 to Nye County DA’s office so the charges could be dropped.” (EEOC Intake Notes,
3 at 2). VEA Board Member David Hall allegedly told Evans on or about May 3,
4 2019 that the Board “was waiting wanted until . . . Nye County played their hand.”
5 (Evans Dep. at 154:1-4, 154:12, ECF No. 80-4). Interim CEO Peck also signaled
6 that the Board’s decision about Evans’ return depended on the District Attorney’s
7 decision in the criminal case, (Press Footage of Richard Peck, ECF No. 80-27),
8 and confirmed that a public summary of the report was not sent to the District
9 Attorney until at least May 17, 2019. (Jeffrey Meehan, *Valley leader speaks on*
10 *ongoing investigations*, PAHRUMP VALLEY TIMES May 17, 2019, at 3, ECF No. 51-1).
11 Counsel for VEA sent a public summary of the report to District Attorney Arabia
12 on May 21, 2019. (Arabia Email at 1). A reasonable factfinder could conclude that
13 VEA’s delay in sending a summary of the report exonerating Evans of
14 embezzlement to the district attorney while “waiting for them to play their hand”
15 creates a genuine dispute of material fact as to whether VEA supported Evans
16 after she was accused of embezzlement.

17 Finally, there is also a dispute as to whether Evans could have resumed her
18 role as CEO at VEA. VEA argues that it knew by May 2019 that “the damage to
19 its relationship with its members would be irreparable if VEA did not part ways
20 with Plaintiff” (MSJ at 7:16-18; Hall Aff. ¶14) because VEA “could not repair its
21 relationship with its member-owners unless Plaintiff’s employment ended.” (MSJ
22 at 15:7-8). Bart Thurgood, VEA’s Executive Vice President of Human Resources,
23 was more equivocal. Though he acknowledged the acrimony at VEA Board
24 meetings, when asked in his Rule 30(b)(6) deposition about how VEA members
25 would have responded to Evans’ return, he answered that he did not know.
26 (Response at 6:13-15; Thurgood Dep. at 132:6-9 (“Q. Do you know what effect
27 the confidence in the membership would have been if Ms. Evans would have been
28 brought back[?] A. No, I don’t know. I don’t know.”)).

1 In sum, Evans has presented the minimal evidence required to raise a
 2 genuine issue of material fact as to whether VEA's alleged reason for firing her
 3 was pretextual. Therefore, this Court denies VEA's Motion for Summary
 4 Judgment as to Evans' Title VII Discrimination Claims (Claims 1-3).

5 **C. Evans Presents Genuine Issues of Material Fact Regarding Her**
 6 **Retaliation Claims Under Title VII (Claims 1-3, 6)**

7 **1. Legal Standard**

8 Evans claims that her termination was retaliatory. Title VII's anti-retaliation
 9 provision, set forth in 42 U.S.C. § 2000e-3(a), prohibits an employer from
 10 discriminating against any employee *because* the employee has made a charge
 11 against it. *Id.* To state a claim for retaliation, a plaintiff must allege she (1)
 12 engaged in a protected activity, (2) her employer subjected her to a materially
 13 adverse employment action, and (3) a causal link exists between the protected
 14 activity and the adverse action. *Westendorf v. W. Coast Contractors of Nev., Inc.*,
 15 712 F.3d 417, 422 (9th Cir. 2013) (citations omitted). If Evans states a *prima*
 16 *facie* case of retaliation, the burden shifts to VEA to "advance a legitimate,
 17 nonretaliatory reason for any adverse employment action taken against [Evans]." *See Reynaga*,
 18 847 F.3d at 693 (citing *Steiner v. Showboat Operating Co.*, 25 F.3d
 19 1459, 1464-65 (9th Cir. 1994). If VEA proffers such a nondiscriminatory reason,
 20 Evans "has the ultimate burden of showing that [VEA's] proffered reasons are
 21 pretextual." *Id.* (quoting *Steiner*, 25 F.3d at 1465).

22 **2. Evans makes a prima facie case of retaliation under Title VII.**

23 Here the issue is whether Evans has presented sufficient evidence to satisfy
 24 the causation requirement. VEA does not contest that Evans engaged in protected
 25 activity by filing her internal complaint on June 17, 2019. (MSJ at 20:4-6); *see*
 26 *Passatino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th
 27 Cir. 2000) (noting that filing an internal complaint is a protected activity under
 28 Title VII). Nor does VEA dispute that Evans suffered an adverse employment

1 action when VEA fired her on June 28, 2019. *See* (MSJ at 20:4-6); *Reynaga*, 847
2 F.3d at 693 (observing that Title VII covers “non-trivial employment actions” that
3 would deter reasonable employees from complaining).

4 In disputing causation, VEA argues that Evans must show that retaliation was
5 the sole reason she was fired based on the “high ‘but for’ standard of causation
6 that is required to support her retaliation claims.” (MSJ at 20:4-7) (citing *Univ. of*
7 *Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346-47 (2013)). VEA argues that
8 Evans cannot satisfy that standard because “VEA made the decision to terminate
9 Plaintiff’s employment *before* she ever asserted a single complaint of
10 discrimination.” (MSJ at 20:4-7) (emphasis added). VEA’s argument turns on the
11 meaning of the statutory phrase “because,” specifically, whether Evans was fired
12 “because” she filed a discrimination complaint with VEA days before she was
13 fired. While VEA, citing *Nasser*, argues that retaliation must be the sole “but-for”
14 cause of termination, the Supreme Court in *Bostock* clarified that Title VII
15 requires a plaintiff to show that retaliation was a but-for cause, not the *sole* but-
16 for cause. 140 S. Ct. 1731, 1739 (2020).

17 Though *Bostock* involved sex discrimination, its reasoning applies with equal
18 force to Evans’ retaliation claim involving the same statutory term. *Id.* (construing
19 Title VII provision prohibiting discrimination based on sex). Title VII’s provisions
20 prohibiting status-based discrimination and retaliation both use the term
21 “because” as the operative causation element. *Compare* 42 U.S.C. § 2000e–2(a)(1)
22 (prohibiting discrimination “because of” an individual’s race, color, religion, sex,
23 or national origin) *with* 42 U.S.C. § 2000e–3(a) (prohibiting retaliation “because”
24 an employee engaged in protected activity, including filing an internal complaint).
25 In *Bostock*, the Court held that “Title VII’s ‘because of’ test incorporates the
26 ‘simple’ and ‘traditional’ standard of but-for causation.” *Bostock*, 140 S. Ct. at
27 1739. “When it comes to Title VII, the adoption of the traditional but-for causation
28 standard means a defendant cannot avoid liability just by citing some *other* factor

1 that contributed to its challenged employment decision. So long as the plaintiff's
2 sex was one but-for cause of that decision, that is enough to trigger the law." *Id.*
3 (emphasis in original). *See also Thomas v. CalPortland Co.*, 993 F.3d 1204, 1209
4 (9th Cir. 2021) (construing *Bostock* but-for causation to apply "at least in the Title
5 VII context"). Under *Bostock*, Evans must only adduce evidence showing that the
6 discrimination complaint she filed at VEA (her protected activity) was a but-for
7 cause of her termination, not the sole cause. Even under the more stringent
8 causation standard, Evans has shown that there is factual dispute as to
9 causation.

10 The timing of Evans' termination, just eleven days after she filed a
11 discrimination complaint, raises an inference of retaliation. To establish a causal
12 connection between her protected activity and the adverse actions, a plaintiff may
13 allege direct or circumstantial evidence from which causation can be inferred,
14 including the temporal proximity of the protected activity and the occurrence of
15 the adverse action. *Pardi v. Kaiser Found. Hosps.*, 389 F.3d 840, 850 (9th Cir.
16 2004) (citing *Bell v. Clackamas Cnty.*, 341 F.3d 858, 865-66 (9th Cir. 2003)).
17 "Temporal proximity between protected activity and an adverse employment
18 action can by itself constitute sufficient circumstantial evidence of retaliation in
19 some cases." *Bell*, 341 F.3d at 865; *see also Flores v. City of Westminster*, 873
20 F.3d 739, 750 (9th Cir. 2017) (inferring retaliation from span of three to eight
21 months) (citing *Coszalter v. City of Salem*, 320 F.3d 968, 977-78 (9th Cir. 2003)).
22 Although VEA argues that it decided to terminate Evans *before* she complained
23 of discrimination on June 17, 2019 (Evans Internal Compl. at 1), a reasonable
24 jury could find otherwise. VEA indicated in Evans' termination letter, dated June
25 28, 2019, that it fired her because she refused to resign and wished to return as
26 CEO, facts that it learned from her internal complaint: "[O]n June 17, 2019, you
27 confirmed that you would not resign and that you intended to resume your
28 position as CEO. Since you elected not to resign, yesterday, June 27, 2019, the

1 Board of Directors of Valley Electric met and voted to terminate your employment
2” (Termination Letter at 2). As used here, the word “since” means “in view of
3 the fact that” or “because.” See *Since*, MERRIAM-WEBSTER.COM DICTIONARY,
4 <https://www.merriam-webster.com/dictionary/since> (last visited December 20,
5 2022). In other words, VEA terminated Evans “since” or “because of” her internal
6 complaint.

7 This Court holds that Evans has presented sufficient evidence to satisfy
8 the causation element, namely, that she was fired because of her internal
9 complaint in which she complained of discrimination and communicated her
10 refusal to resign. The timing of Evans’ termination raises an inference of
11 retaliation; the termination letter makes clear that the Board was aware of her
12 complaint when they voted to fire Evans and fired her because the complaint
13 revealed Evans’ intention not to resign. The close proximity and explicit
14 connection to her complaint satisfy *Bostock*’s “traditional” but-for causation
15 standard and would also satisfy the more stringent, sole but-for causation
16 standard urged by VEA because a reasonable jury could conclude that her
17 complaint was the cause of her termination. Evans therefore satisfies the third
18 prong of Title VII’s prima facie case for retaliation.

19 **3. VEA articulated a legitimate, nondiscriminatory reason for its actions.**

20 As Evans has demonstrated a prima facie case of retaliation under Title VII,
21 the burden then shifts to VEA to “advance a legitimate, nonretaliatory reason for
22 any adverse employment action taken against [Evans].” *Reynaga*, 847 F.3d at
23 693. As discussed, VEA has met this burden by claiming it fired Evans based on
24 her arrest and the related fallout.

25 **4. Evans has raised a genuine issue of material fact regarding retaliatory**
26 **pretext.**

27 Because VEA provides a non-discriminatory explanation for Evans’
28 termination, “the plaintiff must show that the defendant’s explanation is merely

a pretext for impermissible discrimination.” *Dawson, v. Entek Int’l.*, 630 F.3d 928, 936 (9th Cir. 2011) (citing *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000)). “[E]vidence of pretext can take many forms.” *McDonnell Douglas*, 411 U.S. at 804-05. “For example, the manner in which the plaintiff was treated by his employer during his employment may be relevant to a showing of pretext.” *Reynaga*, 847 F.3d at 694 (citing *McDonnell Douglas*, 411 U.S. at 804-05).

Here Evans has raised a triable issue as to VEA’s retaliatory intent. “Proof of a causal link between [Plaintiff’s] complaint and his termination—as evidenced by temporal proximity—is certainly relevant to an evaluation of pretext.” *Reynaga*, 847 F.3d at 695 (citing *Dawson*, 630 F.3d at 937 “In some cases, temporal proximity can by itself constitute sufficient circumstantial evidence of retaliation for purposes of both the prima facie case and the showing of pretext.”). Evans’ prima facie case is strong because she was fired just eleven days after she filed her complaint, which VEA and its Board knew about and specifically referenced when they fired her.

Because a reasonable jury could find that VEA’s proffered reasons for terminating Evans’ employment were pretextual, VEA’s motion for summary judgment as to Evans’ Title VII Retaliation Claim (Claims 1-3, 6) is denied.

D. Evans Has Raised a Material Question of Fact Regarding Race/Ethnicity Discrimination and Retaliation under 42 U.S.C. 1981 (Claims 4 and 6)

1. Legal Standard

Section 1981 of Title 42 prohibits race discrimination in the making and enforcing of contracts, including employment contracts. 42 U.S.C. § 1981(a). Because “legal principles guiding a court in a Title VII dispute apply with equal force in a § 1981 action,” *Manatt v. Bank of Am., NA*, 339 F.3d 792, 797 (9th Cir. 2003), this Court incorporates by reference the legal standards relating to Title VII discrimination and retaliation, including the *McDonnell Douglas* burden-

1 shifting framework.

2 The *McDonnell Douglas* framework presumes a but-for causation standard.
3 *Comcast Corp. v. Nat’l Ass’n. of African Am.-Owned Media*, 140 S. Ct. 1009, 1019
4 (2020) (“*McDonnell Douglas* arose in a context where but-for causation was the
5 undisputed test. . . .”). VEA argues that *Comcast* introduces a sole but-for
6 causation requirement to § 1981 and, under that test, Evans’ § 1981 claim would
7 be defeated by her statement that “[h]ad [she] not been arrested and falsely
8 accused by Nye County, [she] would still have a job.” (MSJ at 22:7-8; Evans Dep.
9 Tr. At 41:25-42:5, ECF No. 80-7).

10 In applying *Comcast*, however, the Ninth Circuit has explicitly rejected the sole
11 but-for causation test and instead recognized that a plaintiff must merely present
12 evidence showing discrimination *because of* race—where race is a but-for cause.
13 See *Yoshikawa v. Seguirant*, 41 F.4th 1109, 1117 (9th Cir. 2022). In *Yoshikawa*,
14 the defendants argued that an independent non-discriminatory reason for their
15 action defeated the plaintiff’s 1981 claim. *Id.* Rejecting the argument, the Ninth
16 Circuit explained that the sole but-for causation standard would defeat any race
17 discrimination claim “as long as the defendant provided some justification for the
18 discriminatory act,” which was inconsistent with the anti-discrimination purpose
19 of the statute. *Id. see also Comcast*, 140 S. Ct. at 1020 (Ginsburg, J., concurring)
20 (explaining that a restrictive reading is incongruous with § 1981’s “intent[] to ...
21 secure ... practical freedom.” (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409,
22 431 (1968))). This approach is also consistent with the Title VII causation
23 requirement under *Bostock*. See *Bostock*, 140 S. Ct. at 1739 (observing that Title
24 VII requires “one but-for cause” for the challenged decision and an employer
25 cannot avoid liability “by citing some *other* factor” that contributed to the
26 challenged decision). See *Manatt* 339 F.3d at 797. (“[L]egal principles guiding a
27 court in a Title VII dispute apply with equal force in a § 1981 action.”).

28 //

2. Evans raises a genuine issue of material fact as to her § 1981 discrimination and retaliation claims.

This Court incorporates its discussion of Evans’ Title VII discrimination and retaliation claims, above. As with her Title VII claims, Evans successfully raised genuine disputes of material fact under § 1981 as to whether persons outside her protected classes were treated more favorably by VEA and whether VEA’s proffered reason for her termination—her arrest—was pretextual in both the discrimination and retaliation contexts. However, Evans’ harassment claim under § 1981 fails as a matter of law.

Title VII hostile work environment standards are equally applicable to actions arising under 42 U.S.C. § 1981. *Manatt*, 339 F.3d at 797. In order for a Plaintiff to succeed on their claim of a hostile work environment based on race or sex, the plaintiff must demonstrate: “(1) that [s]he was subjected to verbal or physical conduct of a racial [or sexual] nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff’s employment and create an abusive work environment.” *Reynaga*, 847 F.3d at 686 (9th Cir. 2017) (quoting *Vasquez v. City of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003). “[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious)’ are not sufficient to create an actionable claim under Title VII, but the harassment need not be so severe as to cause diagnosed psychological injury.” *Reynaga*, 847 F.3d at 687 (quoting *Faragher*, 524 U.S. at 788).

Evans obliquely raises two instances of harassment based on race. First, Evans alleges that she would have been assigned a white mentor had she been permitted to return to VEA. (Compl. ¶ 44). Second, Evans alleges that a white VEA Board member told her to “resign to save her career.” (Compl. ¶ 45). Neither instance rises beyond the sort of “isolated incident” that is not actionable under Title VII or § 1981 and neither is severe nor pervasive enough to alter the

1 conditions of Evans' employment.

2 For these reasons, this Court denies VEA's Motion for Summary Judgment
3 as to Evans' discrimination and retaliation claims under § 1981, and grants
4 VEA's Motion for Summary Judgment as to Evans' harassment claims under
5 § 1981.

6 **E. Evans' Age Discrimination Claims Fail as a Matter of Law**

7 **1. Legal Standard**

8 The Age Discrimination in Employment Act (ADEA) makes it unlawful for an
9 employer to discriminate "because of [an] individual's age." 29 U.S.C. § 623(a)(1).
10 For the prohibition to apply, Plaintiff must be "at least 40 years of age." 29 U.S.C.
11 § 631(a). At the summary judgment stage, the *McDonnell Douglas* burden shifting
12 framework applies to ADEA cases. *See Shelley v. Green*, 666 F.3d 599, 607 (9th
13 Cir. 2012) (holding that *Gross v. FBL Financial Svcs., Inc.*, 557 U.S. 167 (2009)
14 did not overrule cases utilizing the *McDonnell Douglas* framework to decide
15 summary judgment motions in ADEA cases). Under the ADEA, a plaintiff may
16 demonstrate prima facie case of age-related disparate treatment "by
17 demonstrating that [s]he was (1) at least forty years old, (2) performing [her] job
18 satisfactorily, (3) discharged, and (4) either replaced by substantially younger
19 employees with equal or inferior qualifications or discharged under
20 circumstances otherwise 'giving rise to an inference of discrimination.'" *Schechner*
21 *v. KPIX-TV*, 686 F.3d 1018, 1023 (9th Cir. 2012) (quoting *Diaz v. Eagle Produce*
22 *Ltd. P'ship.*, 521 F.3d 1201, 1207 (9th Cir. 2008)).

23 **2. Evans fails to make a prima facie case of age discrimination.**

24 Here, VEA does not contest the first three elements of Evans' prima facie age
25 discrimination case (MSJ at 18:7-19:5), namely, that when Evans was fired she
26 was fifty-six years old (Evans Internal Compl. at 2) and performing her job
27 satisfactorily. The only element at issue is whether Evans was either replaced by
28 a substantially younger employee or there is circumstantial evidence giving rise

1 to an inference of age-related discrimination. “Generally, an employee can satisfy
2 the last element of the prima facie case only by providing evidence that he or she
3 was replaced by a substantially younger employee with equal or inferior
4 qualifications.” *Diaz*, 521 F.3d at 1207 fn.2. (noting that other “circumstantial
5 evidence” can be considered if former position goes unfilled). Evans was not
6 replaced by a substantially younger employee. Of the four CEOs to serve at VEA
7 since Evans’ arrest, including acting, interim, and non-interim CEOs (MSJ at
8 9:21-22; Thurgood Aff. ¶29), only one, Steve Morrison, was younger than Evans
9 and he served as CEO for less than one week. (Thurgood Aff. ¶28). Evans’
10 permanent replacement, Mark Stallons, is about five years older than Evans.
11 (Thurgood Aff. ¶29). Because three of the four temporary or permanent
12 replacements were older than her, Evans fails to present a prima facie case of
13 age-related discrimination because she was not replaced with a substantially
14 younger employee.

15 Therefore, this Court grants VEA’s Summary Judgment Motion as to Evans’
16 ADEA claim (Claim 5).

17 **F. Evans’ Luring Claims Fail as a Matter of Law**

18 Evans’ Complaint alleges that at the time she was hired, “VEA made false or
19 deceptive representations or false pretenses to Evans” (Compl. ¶109) concerning
20 the amount and character of the work, compensation, and other conditions of
21 employment in violation of Nevada’s “luring” statute, NRS 613.010, which
22 provides a private right of action for a worker who was induced by false or
23 deceptive representations, false advertising, or false pretense to change her place
24 of employment or abode. NRS 613.010(3). The gravamen of Evans’ claim is that
25 VEA falsely represented that it was an equal employment opportunity employer
26 and does not engage in unlawful discrimination or retaliation. (ECF No. 1. at 16).
27 VEA argues that Evans initiated contact with VEA, has not produced the
28 employment advertising at issue, and the types of representations at issue are

1 not actionable misrepresentations.

2 The Court need not reach every argument made by VEA because Evans does
3 not identify any evidence tending to show that at the time the alleged claim was
4 made it was untrue. Evans admits that VEA paid her the salary she was promised
5 in her initial job offer (Evans Dep. at 38:24, ECF No. 80-4) and the job description
6 she received upon her hire at VEA was mostly accurate.² (Evans Dep. at 66:20-
7 24, ECF No. 80-4). Evans concedes that her claim is now narrower than alleged:
8 It is based on representations that VEA is an equal opportunity employer that
9 does not discriminate or retaliate, which she claims is wholly untrue and was
10 discovered “based upon her own unlawful treatment. . . .” (ECF No. 86 at 19:1-
11 2). Where no factual showing is made in opposition to a motion for summary
12 judgment, the District Court is not required to search the record *sua sponte* for
13 some genuine issue of material fact. *See Carmen v. San Francisco Unified School*
14 *Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001). Evans points to no objective evidence
15 in the record that demonstrates that, at the time of the alleged advertisement,
16 VEA was not an equal opportunity employer that did not retaliate. Evans’ general
17 reference to her own treatment is not a specific factual showing that
18 demonstrates the existence of a genuine issue of material fact.

19 Therefore, this Court grants VEA’s Motion for Summary Judgment as to
20 Evans’ Luring Claims (Claim 7).

21 **G. Evans’ Negligent Hiring and Retention Claims Fail as a Matter of Law**

22 Evans claims that VEA’s negligent hiring and retention of employees caused
23 her termination. Evans’ negligent hiring and retention claims fail both because
24 they are preempted by the Nevada Supreme Court’s interpretation of NRS
25 613.330 and because Evans does not provide a factual basis for her assertion
26

27 ² Evans notes that the Executive Vice President job description specified Evans
28 would report to the Chief Operating Officer (COO), a position that Evans believes
was not in place when VEA hired her. (Evans Dep. at 66:20-24, ECF No. 80-4).

1 that VEA failed to train its Board Members.

2 Nevada recognizes the tort of negligent hiring, training, supervision, and
3 retention. *Hall v. SSF, Inc.*, 930 P.2d 94, 99 (1996). An employer has a duty to
4 use reasonable care in the hiring, training, supervision, and retention of
5 employees to make sure that its employees are fit for the positions. *Id.*; *Blanck v.*
6 *Hager*, 360 F.Supp.2d 1137, 1157 (D. Nev. 2005).

7 “The Nevada Supreme Court has consistently found that NRS 613.330
8 preempts common law claims premised on employment discrimination.” *Levy v.*
9 *Mandalay Corp.*, No. 2:14-CV-01636-GMN, 2015 WL 3629633 (D. Nev. June 10,
10 2015) (citing *Sands Regent v. Valgardson*, 777 P.2d 898, 900 (Nev. 1989) (“the
11 Legislature has addressed the gravity of violating Nevada's public policy against
12 age discrimination by defining the extent of the remedy available to parties
13 injured by such discrimination.”); *D'Angelo v. Gardner*, 819 P.2d 206, 217 n.10
14 (1991) (“no additional court-created remedies ... arise out of age-based wrongful
15 discharge for which tort recovery is available by statute.”)). This case is unlike
16 those where federal courts have found NRS 613.330 did not preempt common
17 law employment-related claims based on facts involving torts like sexual assault,
18 battery, or false imprisonment. *See, e.g., Painter v. Atwood*, 912 F.Supp.2d 962,
19 964 (D. Nev. 2012); *Meza-Perez v. Sbarro LLC*, No. 2:19-CV-00373-APG-NJK,
20 2020 WL 12752817 (D. Nev. Dec. 16, 2020). Because the facts underlying Evans’
21 negligent hiring claim are the same as those underlying her employment
22 discrimination claims, this Court finds that Evans’ claims negligent hiring
23 allegations are “clearly intended to be remedied by the statutory framework” and
24 do not give rise to separate common law tort claims. *Jackson v. Universal. Health*
25 *Servs. Inc.*, No. 2:13-CV-01666-GMN, 2014 WL 4635873 at *4 (D. Nev. Sept. 15,
26 2014) (quoting *Painter*, 912 F.Supp.2d at 964-65).

27 Summary judgment on Evans’ negligent hiring claim is further required
28 because Evans has provided no factual basis for her assertion that VEA failed to

1 train its Board members on relevant statutory issues related to employment law,
 2 or hired persons where antecedent circumstances would “give [VEA] reason to
 3 believe that the person, by reason of some attribute of character or prior conduct,
 4 would create an undue risk of harm to others in carrying out his or her
 5 employment responsibilities.” *Hall*, 930 P.2d at 99 (quotation omitted). “Nevada
 6 law does not permit the inference that an employer was negligent in training or
 7 supervising simply because the Defendant's employees acted in a discriminatory
 8 manner; ‘the fact that an employee acts wrongfully does not in and of itself give
 9 rise to a claim for negligent hiring, training, or supervision.’” *Romero v. Nevada*
 10 *Dept. of Corrections*, No. 2:08-CV-808-JAD-VCF, 2013 WL 6206705 at *17 (D.
 11 Nev. Nov. 27, 2013) (quoting *Colquhoun v. BHC Montevista Hosp., Inc.*, 2:10-CV-
 12 00144-RLH-PAL, 2010 WL 2346607, at *3 (D. Nev. June 9, 2010)).

13 Therefore, this Court grants VEA’s Motion for Summary Judgment as to
 14 Evans’ Negligent Hiring and Supervision Claim (Claim 8).

15 **V. CONCLUSION**

16 The Court notes that the parties made several arguments and cited to
 17 several cases not discussed above. The Court has reviewed these arguments and
 18 cases and determines that they do not warrant discussion as they do not affect
 19 the outcome of the motions before the Court.

20 IT IS THEREFORE ORDERED THAT VEA’s Motion for Summary Judgment
 21 (ECF No. 80) is GRANTED-IN-PART and DENIED-IN-PART as follows:

- 22 • VEA’s Motion for Summary Judgment is DENIED as to Evans’ Title VII
 23 and § 1981 claims (Claims 1-4) relating to discrimination and
 24 retaliation;
- 25 • VEA’s Motion for Summary Judgment is GRANTED as to Evans’ Title
 26 VII and § 1981 claims (Claims 1-4) relating to workplace harassment;
- 27 • VEA’s Motion for Summary Judgment is GRANTED as to Evans’ age-
 28 related discrimination claims (Claim 5).

- VEA's Motion for Summary Judgment is DENIED as to Evans' retaliation claims based on sex and race (Claim 6).
- VEA's Motion for Summary Judgment is GRANTED as to Evans' luring (Claim 7) and negligent hiring (Claim 8) claims.

IT IS FURTHER ORDERED THAT Evans' Motion for an Order Directing Additional Discovery (ECF No. 87) is DENIED without prejudice as moot.

DATED THIS 13th Day of January, 2023.

A handwritten signature in black ink, appearing to read "Anne R. Traum", is written over a horizontal line.

ANNE R. TRAUM
UNITED STATES DISTRICT JUDGE